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No. 00-1514

IN THE

Supreme Court of the United States

LANCE RAYGOR and JAMES GOODCHILD,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the Minnesota Supreme Court correctly hold that 28 U.S.C. § 1367(d) cannot be applied to abrogate the State's statutory limitation of its waiver of sovereign immunity from suit in its own courts?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those cited in Petitioners' brief, Respondent provides the following citations of constitutional provisions and statutes involved in this case:

Constitution of the United States

Article I, section 8, clause 9: "The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court[.]"

Article I, section 8, clause 18: "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article III, section 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Supplemental Jurisdiction 28 U.S.C. § 1367

Petitioners only set out a portion of § 1367 in their brief. For convenience, Respondent provides the entire statute in the appendix to this brief.

Minnesota Human Rights Act

Minn. Stat. § 363.14, subd. 2: "Any action brought pursuant to this section shall be filed in the district court of the county wherein the unlawful discriminatory practice is alleged to have been committed . . . ."

STATEMENT OF THE CASE

This case arises from Petitioners' state law claims of employment discrimination asserted against Respondent Regents of the University of Minnesota (University) in state court. In August 1995, Petitioners Raygor and Goodchild filed charges of discrimination with the Minnesota Department of Human Rights (MDHR). (Certiorari Petition Appendix [hereinafter Pet. App.] A43-A45.) Petitioners alleged they were discriminated against on the basis of age in violation of the Minnesota Human Rights Act (MHRA) in connection with changes the University made to their job assignments the previous December. (Pet. App. A45.)

On July 17, 1996, the MDHR sent Petitioners letters notifying them of dismissal of their claims. (Pet. App. A46.) Petitioners received these state dismissal notices on or about July 18, 1996. (Pet. App. A28.) The notice letters advised

each Petitioner that he could bring a civil action against the University "*in state district court within 45 days of receipt of [the] letter*." (Pet. App. A46 (emphasis added).)[1]

Rather than file their state law claims in state court within 45 days as directed by the State, on day 43 of the 45-day limitations period (August 30, 1996) Petitioners each filed a federal court lawsuit against the University alleging violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA), and appending state law claims. The University timely answered the complaints, asserting its Eleventh Amendment immunity to the federal and state law claims.[2] (Answer ¶ 10, *Goodchild v. Univ. of Minn.*, Case No. 4-96-863 (D. Minn.) [hereinafter *Goodchild* Federal Case]; Answer ¶ 11, *Raygor v. Univ. of Minn.*, Case No. 4-96-862 (D. Minn.) [hereinafter *Raygor* Federal Case].) The University also alleged the statute of limitations as an affirmative defense. (Answer ¶ 16, *Goodchild* Federal Case; Answer ¶ 17, *Raygor* Federal Case.)

1. Under Minnesota law, Petitioners had the option of commencing suit in state district court within one year of the date of the alleged discriminatory actions, or commencing an agency review process, in which case any suit had to have been commenced in state court within 45 days of the receipt of notice of the agency's dismissal of their claims. *See* Minn. Stat. §§ 363.06, subd. 3; 363.14, subd. 1 (2000). Petitioners chose the latter route. While Petitioners reference the notice letters they received from the EEOC at their request (Petitioners' Brief at 3), these letters are irrelevant to Petitioners' state law claims. The EEOC letters did not identify a judicial forum.

2. The United States Court of Appeals for the Eighth Circuit reaffirmed that the University is an arm of the State for Eleventh Amendment purposes in *Treleven v. University of Minnesota*, 73 F.3d 816, 819 (8th Cir. 1996), decided seven months before Petitioners began their federal action.

It immediately was clear that the federal court lacked subject matter jurisdiction over the MHRA claims under *Pennhurst State School Hospital v. Halderman*, 465 U.S. 89, 121 (1984) (*Pennhurst II*). When Petitioners filed their lawsuits, however, it was not yet settled whether federal court jurisdiction existed over their ADEA claims, inasmuch as this Court had not yet decided *Kimel v. Florida Board of Regents*, 528 U.S. 62, 67 (2000) (holding that Congress lacks authority to abrogate the States' Eleventh Amendment immunity on ADEA claims). Accordingly, consistent with the requirements of the original pretrial scheduling orders and the spirit of the Federal Rules of Civil Procedure, the parties began merits discovery. (*See* Pretrial Scheduling Order ¶ 2(a), *Goodchild* Federal Case; Pretrial Schedule ¶ 1, *Raygor* Federal Case.)

After the federal district court decided the question of its subject matter jurisdiction over ADEA claims filed against the University in another case,[3] the parties here stipulated to an amendment to the pretrial scheduling order that specifically provided for the University to submit a dispositive motion. In this stipulation, the parties stated that they "would like to postpone certain fact-gathering and discovery" until after the University's motion to dismiss was resolved. (Stipulation & Order Concerning Scheduling, entered in *Goodchild* Federal Case and *Raygor* Federal Case after consolidation [hereinafter Consolidated Federal Case].) The University submitted its dispositive motion in accordance with the parties' agreement as set forth in the Stipulation and Order.

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3. *Humenansky v. Bd. of Regents of the Univ. of Minn.*, 958 F. Supp. 439, 443 (D. Minn. 1997) (holding that University has Eleventh Amendment immunity from ADEA claims), *aff'd*, 152 F.3d 822 (8th Cir. 1998), *cert. denied*, 528 U.S. 1114 (2000).

The University sought dismissal of all claims, state and federal, in the Consolidated Federal Case on the basis of its Eleventh Amendment immunity.[4] Petitioners did not oppose the motion with respect to the state law claims, stating that they did "not dispute the state's potential Eleventh Amendment immunity from state discrimination claims in Federal Court." (Petitioners' Mem. Opp'n Mot. Dismiss at 9 n.8, Consolidated Federal Case.)

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4. Petitioners' suggestion that the University, through the timing of this dispositive motion, was responsible for their failure to meet the state statute of limitations has no merit. The University raised its Eleventh Amendment defense in its very first pleading. Because Petitioners commenced their federal court lawsuits only *two days* before expiration of the MHRA limitations period, it would not have mattered if the University had moved to dismiss twenty days after being served, or some months later. Practically speaking, the University could have done nothing to "save" Petitioners from their decision to file their state law claims only in federal court with two days remaining. On the other hand, Petitioners easily could have satisfied the limitations deadline merely by filing their state claims in state court, as they were directed to do in the State's notice. (*See* MDHR Notice Letter, Pet. App. A46.) Petitioners' discussion of the paper discovery conducted by the University is also without relevance. First, Petitioners did not raise this argument to the federal court below; they cannot argue it now. (*See* Petitioners' Mem. Opp'n Mot. Dismiss, Consolidated Federal Case.) Second, there is no merit to the notion that the University implicitly waived its Eleventh Amendment immunity by conducting paper discovery. *See Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974) (stating that the Court will consider an Eleventh Amendment defense even if it is not raised until the case is on review before the Supreme Court); *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 467 (1945) (finding that a State defendant did not waive its Eleventh Amendment immunity by defending a case on the merits and not objecting on the basis of the Eleventh Amendment until proceedings in the Supreme Court).

This concession made it unnecessary for the University to make any further argument on the state law claims. On July 11, 1997, the federal court dismissed the entire federal case — both the ADEA and state law claims — based upon the University's Eleventh Amendment immunity. (Pet. App. A50.) Petitioners appealed this decision. (Pet. App. A51.)[5]

On July 31, 1997 — twenty days after the dismissal of their federal case and some 378 days after receipt of their state dismissal notices — Petitioners filed suit on their state law claims in state court against the University. The state trial court initially stayed the action pending resolution of Petitioners' appeal of the dismissal of their federal case, which appeal raised the issue later resolved by this Court in *Kimel*. The state trial court thereafter lifted the stay for the limited purpose of considering, and then granting, the University's dispositive motion on the MHRA claims on the basis of the statute of limitations. (Pet. App. A27; Pet. App. A55.) Petitioners appealed this ruling to the Minnesota Court of Appeals, which reversed, accepting Petitioners' argument that 28 U.S.C. § 1367(d) (1994) tolled the otherwise-expired state statute of limitations. *Raygor v. Univ. of Minn.*, 604 N.W.2d 128, 133, Pet. App. A16, A17 (Minn. Ct. App. 2000), *rev'd*, 620 N.W.2d 680 (Minn. 2001).

The Minnesota Supreme Court granted the University's Petition for Review and, in a unanimous opinion, reversed the intermediate appellate court's decision. Recognizing that "the University's waiver of immunity" was "limited to the parameters set forth by state statute," the State's highest court

5. Petitioners dismissed their appeal after this Court decided *Kimel*. (Notice of Withdrawal of Appeal, *Raygor v. Univ. of Minn.*, File No. 97-3210MNMI (8th Cir. filed Jan. 13, 2000).)

held that "the state's waiver of sovereign immunity for MHRA claims" was limited to "MHRA claims timely filed in state court." "[A]s defined by state law," the supreme court declared, "the University's exposure to MHRA suit in this case existed only for the 45-day period." *Regents of the Univ. of Minn. v. Raygor*, 620 N.W.2d 680, 686, Pet. App. A1, A12 (Minn. 2001). Accordingly, the supreme court held that "section 1367(d) does not apply to toll the statute of limitations" on Petitioners' MHRA claims against the University. *Id.* at 687, Pet. App. A14. This Court granted certiorari on June 4, 2001.

SUMMARY OF ARGUMENT

The issues in this case arise out of an untimely private state court action to enforce state law against a State entity undisputedly cloaked with the State's sovereign immunity. The state statute at issue required suit to be commenced in state court within 45 days of Petitioners' receipt of notice from the State, which Petitioners chose to ignore. The Minnesota Supreme Court concluded unanimously that Minnesota law afforded them no relief from the consequences of their untimely filing. Petitioners now seek to have a federal court — this Court — apply a federal statute, 28 U.S.C. § 1367(d), to force Minnesota to abrogate state statutory limitations applicable to this action, limitations that circumscribe its waiver of sovereign immunity from this suit in its own courts.

The extraordinary federal intrusion requested by Petitioners into private state court litigation against a State sovereign should be rejected for three reasons. First, as the Minnesota Supreme Court held, § 1367(d) cannot constitutionally be applied to abrogate Minnesota's 45-day limit on the waiver of its sovereign immunity from suit in its

own courts. Second, § 1367(d) need not and should not be interpreted as an attempt to require such abrogation. Finally, if the question is reached, § 1367(d) exceeds Congress's lawmaking powers under the U.S. Constitution.

In this case, the Minnesota Supreme Court held as a matter of state law that the University's exposure to suit existed only for the 45-day period provided in the MHRA. Under *Alden v. Maine*, the immunity of the sovereign from suit in its own courts is within "the sole control" of the sovereign itself. 527 U.S. 706, 749 (1999). Congress has no power under Article I to force an unconsenting State to submit to a private suit in its own courts. *Id.* at 754. Under our federalism, the power to decide how far, and on what conditions, to extend the State's consent to be sued rests with the State, not the federal government. Thus, as the Minnesota Supreme Court held, § 1367(d) cannot be applied to abrogate Minnesota's 45-day limit on its waiver of sovereign immunity for MHRA claims.

Application of § 1367(d) in this case cannot be defended as merely an adjunct to the federal court's power to adjudicate the state claims that Petitioners initially filed against the State sovereign in federal court. Under *Pennhurst II*, Petitioners' state claims against the unconsenting sovereign were beyond the Article III jurisdiction of the federal court. The Eleventh Amendment not only required dismissal of Petitioners' state claims against the sovereign, it also precluded federal court jurisdiction from being invoked to resurrect the sovereign's liability on such claims in a subsequent state court proceeding. *Pennhurst II* precludes any application of tolling as an adjunct to a non-existent federal judicial power to adjudicate Petitioners' state claims against the sovereign.

Although § 1367(d) would be unconstitutional under *Alden* and *Pennhurst II* if applied to this case as Petitioners suggest, the statute should not be so interpreted. There is no evidence on the face of the statute (or in the legislative history) that Congress intended to abrogate state sovereign immunity when it enacted § 1367. Section 1367 refers neither to state immunity from suit, nor to the States as defendants at all. Under this Court's "clear statement" rule, the absence of explicit statutory language mandating abrogation of sovereign immunity is dispositive. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). Most important, employing the "clear statement" principle here avoids "constitutionally doubtful constructions" of § 1367(d). *Jones v. United States*, 529 U.S. 848, 851 (2000).

Apart from the statute's utter silence on the issue of abrogation of state sovereign immunity, it is apparent from the structure of the statute and its legislative history that § 1367(d) applies only to state claims that are within the federal court's jurisdiction, but that are dismissed for discretionary reasons under § 1367(c). Since Petitioners' state claims were not within the federal court's jurisdiction at all, they were not — and could not have been — dismissed for discretionary reasons under § 1367(c), and thus were not subject to tolling under § 1367(d).

Finally, while this case may be resolved based on principles of state sovereign immunity and statutory interpretation, there is a broader, independent constitutional infirmity with § 1367(d): it exceeds the scope of Congress's lawmaking powers. Petitioners seem to suggest that the tolling provision falls within Congress's tribunal power granted in Article I and reflected in

Article III to establish and regulate the federal courts. But Congress's tribunal power does not provide any plenary authority to rewrite state statutes of limitations applicable to a vast, unspecified variety of state law claims filed in the courts of the several States. Rather, the tribunal power authorizes Congress to prescribe procedural rules for use in cases pending in *federal court*. Petitioners cite not a single decision of this Court affirming the use of Congress's tribunal power to displace state substantive law delimiting state claims filed in state courts across the United States. Alternatively, had Congress relied upon its commerce power to enact the tolling provision — and nothing whatever indicates that it did — this Court's recent Commerce Clause decisions confirm that such power would be insufficient. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995).

ARGUMENT

The Petition for a Writ of Certiorari stated that it was of "especial importance" for this Court to resolve the "constitutional question" presented in this case. (Cert. Pet. at 6.) Yet, Petitioners' brief largely fails to analyze the constitutional issues. Instead, their brief attempts to paint a picture of past procedural unfairness and pays tribute to Congress in crafting "a sensible and balanced solution" to this "important problem." (Petitioners' Brief at 13, 24.) As the Minnesota Supreme Court recognized, however, the question whether § 1367(d) applies to state law claims against a State in its own courts only can be answered if the statute is read against the background of the Tenth and Eleventh Amendments, the fundamental principles of federalism these Amendments embody, and the decisions of this Court that interpret them. So viewed, it is plain that § 1367(d) cannot apply

to abrogate the State's statutory limitation of its waiver of sovereign immunity from suit in its own courts.

I. Section 1367(d) Cannot Constitutionally Be Applied to Abrogate Minnesota's 45-Day Limit on the Waiver of Its Sovereign Immunity From Suit in Its Own Courts.

Under Minnesota law, a 45-day limitations period is a condition on the State's waiver of sovereign immunity for MHRA suits in its own courts. *Raygor*, 620 N.W.2d at 686, Pet. App. A12. Congress has no power to alter this limitation and expand the State's waiver of sovereign immunity from suit in its own courts. Petitioners' initial decision to file their claims against Minnesota in a federal forum that had no jurisdiction over those claims does not change this result.

This Court has made clear that Congress cannot instruct a *state* court to entertain a private suit under *federal* law against an unconsenting sovereign. *Alden*, 527 U.S. at 754. Nor may Congress instruct a *federal* court to entertain a private suit under *state* law against an unconsenting sovereign. *See Pennhurst II*, 465 U.S. at 121. These constitutional principles are undisputed, yet Petitioners claim that Congress has — and has exercised — a vastly more intrusive constitutional power to instruct a *state* court to entertain a private suit under *state* law against an unconsenting sovereign. That simply cannot be.

A. Congress Lacks Power Under Article I to Force an Unconsenting State to Submit to a Private Suit in Its Own Courts.

Congress has no power under Article I to force an unconsenting State to submit to private suits for damages, either in federal courts or in its own courts. *See Alden*, 527 U.S. at 754 (holding that "the States retain immunity from private suits in their own courts, an immunity beyond congressional power to abrogate by Article I legislation"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").[6] As this Court has observed, "When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government." *Atlantic Coast Line R.R. Co. v. Bhd. of*

6. The inescapable conclusion from *Alden* and *Seminole Tribe* is even more apparent in light of this Court's decision in *Kimel*. *Kimel* held that Congress lacks the power to abrogate the immunity of an unconsenting State to private age discrimination suits. 528 U.S. at 67. The arguments in favor of the purported congressional abrogation power in *Kimel* were much stronger than they are here, because: (a) the statute at issue purported to authorize suits in federal courts, not to subject States to the indignity of being sued in their own courts at federal command; and (b) Congress had made it unmistakably clear that it perceived a problem of age discrimination justifying invocation of its power under Section 5 of the Fourteenth Amendment to attempt to abrogate state sovereign immunity. Yet this Court held that neither fact sufficed to make the attempted abrogation of state sovereign immunity appropriate. *Id.* at 82-83. If Congress lacks authority to subject a State defendant to a federal age discrimination claim in federal court, *a fortiori* it lacks authority to subject a State defendant to a state age discrimination claim in state court.

Locomotive Eng'rs, 398 U.S. 281, 285 (1970); *see also Printz v. United States*, 521 U.S. 898, 919 (1997); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). One of the powers reserved to the States was the power to decide whether and for what they could be sued in their own courts. *R.R. Co. v. Tennessee*, 101 U.S. 337, 339 (1879); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857). Because the decision to waive sovereign immunity is "altogether voluntary" on the part of the State, "it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires." *Beers*, 61 U.S. (20 How.) at 529.

Petitioners suggest that Minnesota did voluntarily waive sovereign immunity by allowing MHRA claims against it in its courts, and that § 1367(d) merely extends this voluntary waiver of immunity in order to achieve laudable policy objectives as determined by Congress. The problem with this approach — in which the State waives sovereign immunity up to a point and then Congress commands the State to extend the waiver further — is that the authority to decide how far and on what conditions to extend a State's consent to be sued rests with the State, not the federal government. This is true virtually by definition: consent to be sued in state court within 45 days of the receipt of a State-issued notice obviously is not consent to be sued more than a year later. *See Alden*, 527 U.S. at 749 ("[T]he immunity of a sovereign in its own courts has always been understood to be within the *sole control* of the sovereign itself." (emphasis added)); *id.* at 758 ("To the extent

Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit."); *see also Smith v. Reeves*, 178 U.S. 436, 445 (1900) (recognizing that a State may limit the scope of its waiver to suits in state court). The proposition that the federal government has the authority — for noble or for ignoble ends — to expand a State's limited waiver of sovereign immunity is without precedent in this Court's jurisprudence. It rests on the notion that a statute of limitations is a mere procedural technicality, rather than an integral part of — and limitation upon — the State's consent to be sued.

This Court's cases resoundingly reject this derogation of statutes of limitations. Time and again, this Court has emphasized that statutes of limitations are an integral part of any waiver of sovereign immunity and must be strictly construed for that reason. *See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983) ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) ("We should also have in mind that the Act waives the immunity of the [sovereign] and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which [the legislature] intended."); *Soriano v. United States*, 352 U.S. 270, 276 (1957) (stating that the legislature "was entitled to assume that the limitation period it prescribed meant just that period and no more. . . . And this Court has long decided that limitations and conditions upon which the Government consents to be sued

must be strictly observed and exceptions thereto are not to be implied").[7]

It is utter fiction to suggest that the Minnesota Legislature actually has given all the consent that is needed, and that the federally mandated extension of the limitations period constitutes something less than the unconsented abrogation of Minnesota's sovereign immunity.[8] The Minnesota Supreme Court held that

7. While the cases cited in the text involve the sovereign immunity of the federal government, not state sovereign immunity, this Court has stated that "we are reluctant to conclude that the States are not entitled to a reciprocal privilege." *Alden*, 527 U.S. at 750.

8. Minnesota law is quite strict in disallowing extension of a statute of limitations outside the period provided for by the Minnesota Legislature. *See Johnson v. Winthrop Labs. Div. of Sterling Drug, Inc.*, 291 Minn. 145, 151, 190 N.W.2d 77, 81 (1971) ("Courts have no power to extend or modify statutory limitations periods."); *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 464, 92 N.W. 340, 343 (1902) (stating that statutes of limitations "fix periods within which controversies and disputes with respect to rights and liabilities must be brought to an end, and beyond which courts will not lend their aid to litigants"). This is especially true in the MHRA area, because Minnesota favors "prompt resolution of discrimination claims" like those in this case. *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 741 (Minn. 1997). Moreover, the fact that Petitioners chose to file their state law claims in a federal forum, and that those claims were dismissed without a ruling on their merits, does not provide a basis to toll the statute of limitations under Minnesota law. *DeMars v. Robinson King Floors, Inc.*, 256 N.W.2d 501, 505 (Minn. 1977) ("[I]f a claim is dismissed without a determination on the merits, the result is the same as if it had never been filed and the statute of limitations had never been tolled."). Under Minnesota law, "the commencement of an action in a Federal district court which lacks jurisdiction does not toll the statute of

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the MHRA 45-day statute of limitations is a condition on the State's waiver of immunity in this case. "[A]s defined by state law, the University's exposure to MHRA suit in this case existed only for the 45-day period following [Petitioners'] notification of dismissal of charges by the Department of Human Rights." *Raygor*, 620 N.W.2d at 686, Pet. App. A12. This construction of state law by the State's highest court is controlling here. *See, e.g., Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

Petitioners also suggest that "[t]he decisions of this Court have only invalidated acts of Congress based on a far more serious interference with state sovereign immunity." (Petitioners' Brief at 37.) But this argument refutes itself. This Court never has suggested that Congress has the power under Article I to "interfere[] with state sovereign immunity" so long as the interference is not "serious." It, rather, has categorically held that Congress may not abrogate state sovereign immunity pursuant to its Article I powers. *See Alden*, 527 U.S. at 754; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); *Seminole Tribe*, 517 U.S. at 72-74. To make an exception for invasions of sovereign immunity that are deemed not to be "serious" under some unspecified standard would make

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limitations." *Bonhiver v. Graff*, 311 Minn. 111, 126, 248 N.W.2d 291, 300 (1976). Minnesota does not have a saving statute that would save Petitioners' MHRA claims. *Id.*, 248 N.W.2d at 300. Minnesota's saving statute is limited to cases where the plaintiff prosecutes a claim to a judgment and that judgment is reversed on appeal for some reason. In that circumstance, the plaintiff has another year to commence a new action. *See* Minn. Stat. § 541.18 (2000); *see also Kulinski v. Medtronic Bio-Medicus, Inc.*, 577 N.W.2d 499, 504 (Minn. 1998).

nonsense of the constitutional principle. As this Court stated in *College Savings*, permitting Congress to abrogate state sovereign immunity under Article I only when certain conditions are satisfied "would of course limit the evil — but it is hard to say that [this kind of] limitation has any more support in text or tradition than, say, limiting abrogation . . . to the last Friday of the month." 527 U.S. at 684.

B. The Eleventh Amendment Precludes Reliance Upon Federal Court Jurisdiction as a Basis to Abrogate a State's Sovereign Immunity.

Petitioners argue that their decision to file state claims against the State in federal court provides an appropriate constitutional foundation for the application of § 1367(d) to those claims. (Petitioners' Brief at 44.) Defending the purported application of § 1367(d) as an adjunct to the federal courts' adjudicatory powers, however, is unsupportable under this Court's established Eleventh Amendment jurisprudence. Under *Pennhurst II*, Petitioners' state law claims against the sovereign were beyond the jurisdiction of the federal court: "[N]either pendent jurisdiction *nor any other basis of jurisdiction* may override the Eleventh Amendment." 465 U.S. at 121 (emphasis added); *see also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 177-78 n.3 (1997) (Ginsburg, J., dissenting) (observing that supplemental jurisdiction under § 1367 can "embrace the decisions of state . . . agencies, only if the State consents to the district court's jurisdiction"). The Eleventh Amendment not only requires dismissal of state law claims against unconsenting States, it also restrains the use of federal court jurisdiction to expand — or revive entirely, as Petitioners urge — the sovereign's liability to such claims in a subsequent state court proceeding.

When a federal court lacks jurisdiction over a claim, the court may take no further action respecting that claim. "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). A court dismissing state law claims on Eleventh Amendment grounds cannot order any "independent form of relief" that "would bind State officials in any way." *Green v. Mansour*, 474 U.S. 64, 71 (1985) (disapproving notice relief and declaratory judgment when claims are barred by Eleventh Amendment); *cf. Stevens*, 529 U.S. at 779 (concluding that a court could consider whether a State fell within the statutory definition of "person" before resolving the Eleventh Amendment issue because the statutory question did not "permit the court to pronounce upon any issue, or upon the rights of any person, beyond the issues and persons that would be reached under the Eleventh Amendment inquiry anyway").

What federal courts cannot do directly because of the limited scope of Article III, Congress cannot do indirectly through a jurisdictional statute that effectuates Article III. *See Seminole Tribe*, 517 U.S. at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). The tolling requirement provided in § 1367(d) applies here, if at all, *only* because Petitioners invoked the federal court's Article III jurisdiction. *See* 28 U.S.C. § 1367(d) (tolling

applies only to those state law claims that are "pending" in a federal court). When Congress enacts federal jurisdiction statutes like § 1367, however, it cannot require action that goes beyond the scope of the judicial power established by Article III and delimited by the Eleventh Amendment. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983) (noting that congressional legislation may extend to the outer reaches of Article III judicial authority, but it cannot go beyond them). As Petitioners construe § 1367(d), it would violate this principle. Petitioners' construction would allow the jurisdictional statute to surpass the limits of Article III by substantively affecting the State sovereign's rights under state law in a state court proceeding that commenced after a federal court determined that it had no Article III jurisdiction under the Eleventh Amendment. *Pennhurst II* precludes any application of § 1367(d) tolling as an adjunct to a non-existent federal judicial power to adjudicate state claims against the sovereign.

C. Petitioners' Policy Arguments Are Constitutionally Irrelevant and Do Not Require Abrogation of State Sovereign Immunity.

Against these federalism principles enunciated by this Court, Petitioners assert that safeguarding Minnesota's sovereign immunity from suit beyond its 45-day limitations period is inconvenient and undesirable as a matter of policy. As this Court has made clear, however, state sovereign immunity is a foundational element of our Constitution's structure. *See, e.g.*, *Alden*, 527 U.S. at 730 (stating that sovereign immunity from suit without consent "inheres in the system of federalism established by the Constitution"). Petitioners' policy arguments simply cannot displace the constitutional principles that underlie *Alden*.

Even if they were constitutionally relevant — as plainly they are not — Petitioners' policy arguments crumble on close inspection. Petitioners argue that the absence of tolling for Eleventh Amendment-barred claims will result in duplicative lawsuits and inefficiencies because plaintiffs will file their federal claims in federal court and their state claims in state court. This Court in *Pennhurst II* disposed of this type of argument: "[S]uch considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. That a litigant's choice of forum is reduced 'has long been understood to be a part of the tension inherent in our system of federalism.'" *Pennhurst II*, 465 U.S. at 123 (quoting *Employees of the Dep't of Pub. Health & Welfare of Missouri v. Dep't of Pub. Health & Welfare of Missouri*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring) (citation omitted) (footnote omitted)). Some fifty years earlier in *Missouri v. Fiske*, this Court affirmed that the Eleventh Amendment trumps economy arguments such as those Petitioners offer here, observing that "[c]onsiderations of convenience open no avenue of escape from the [Eleventh Amendment's] restriction." 290 U.S. 18, 25-26 (1933); *see also INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government . . . .").

Petitioners argue that the potential for manipulation by State defendants in waiting to raise their Eleventh Amendment defense justifies the application of § 1367(d) tolling. They suggest that State defendants may sabotage plaintiffs' state law claims by

waiting to raise their Eleventh Amendment defense until after the statute of limitations has expired. This is simply an argument for implied waiver, which is flatly inconsistent with this Court's precedent. *See, e.g.*, *Edelman*, 415 U.S. at 677-78 (permitting State to raise Eleventh Amendment defense on appeal). In any event, the University here immediately raised its Eleventh Amendment immunity defense. To guard against a limitations defense, the obvious solution for plaintiffs is to follow the simple roadmap laid out by this Court in *Pennhurst II*: bring state law claims against a State in the appropriate state forum. After all, it is plaintiffs, not State defendants, who control when and where litigation is commenced and whether a limitations period is satisfied. They do not need § 1367(d) to insure that their state claims will be heard in accordance with state law.

Petitioners attempt to bolster their "unfairness" argument by suggesting that state claim preclusion principles would have prevented them from bringing their state law claims in state court if they had not first filed them in federal court. (*See* Petitioners' Brief at 10, 14-16.) The law, however, is not as Petitioners represent it to be. State courts addressing the issue have held that the claim preclusion doctrine does not prohibit a plaintiff from proceeding in state court where the claims pursued in the state court action are barred from federal court by the Eleventh Amendment. *See, e.g.*, *Burlington N. R.R. v. Bd. of Supervisors of Adair County*, 418 N.W.2d 72, 75 (Iowa 1988); *Waterville Indus., Inc. v. Fin. Auth. of Maine*, 758 A.2d 986, 991 (Me. 2000); *Muza v. Missouri Dep't of Soc. Servs.*, 769 S.W.2d 168, 176 (Mo. Ct. App. 1989); *Johnson v. New York*, 631 N.Y.S.2d 795, 798-99 (N.Y. Ct. Claims 1995); *Medo-Bel Creamery, Inc. v. Oregon*, 673 P.2d 537, 540 (Or. 1983);

Boyne v. Harrison, 647 S.W.2d 82, 86 (Tex. Ct. App. 1983).[9]

Likewise, contrary to Petitioners' suggestion (*see* Petitioners' Brief at 10, 16-17), the Minnesota rule would not preclude state law claims that were outside the jurisdiction of the federal courts. In *Beutz v. A.O. Smith Harvestore Products, Inc.*, the Minnesota Supreme Court made clear that its doctrine of claim preclusion only prevents a second suit based upon claims that were within the scope of the subject matter jurisdiction of the first court. 431 N.W.2d 528, 532 (Minn. 1988). Minnesota's claim preclusion doctrine thus did not require that Petitioners

9. The cases Petitioners cite do not compel a different result. Of all of the cases cited in this section of Petitioners' Brief and in their Appendix A, only four even mention the Eleventh Amendment. In *Hall v. Hawaii*, the plaintiff lost on the merits of his federal discrimination claims in federal court, and the federal court's findings collaterally estopped the plaintiff from arguing in state court that the defendants had discriminated against him. 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (1988). In *Shumaker v. Iowa Department of Transportation*, the Iowa Supreme Court ruled, as a matter of Iowa law, that the plaintiff could not refile state law claims in state court after voluntarily dismissing them from federal court. 541 N.W.2d 850, 854-55 (Iowa 1995). *Shumaker* is inapposite here, since Petitioners' state law claims were not withdrawn, but were dismissed by the federal court for lack of subject matter jurisdiction. In addition, as the dissent in *Shumaker* notes, the majority simply may have misunderstood the nature of the Eleventh Amendment. *See id.* at 855 (Carter, J., dissenting). The court in *Penn v. Iowa State Board of Regents*, 577 N.W.2d 393 (Iowa 1998), simply followed *Shumaker*. The last of the four cases, *Hayes v. Town of Orleans*, actually undercuts Petitioners' argument, as the court there suggested that claim preclusion would not apply if the Eleventh Amendment had barred the state law claim in federal court. 39 Mass. App. Ct. 682, 684-85, 660 N.E.2d 383, 385-86 (Mass. Ct. App. 1996).

first bring their MHRA claims in federal court. Rather, *Beutz* confirms that the claim preclusion doctrine, as applied in Minnesota, would not have prevented Petitioners from doing what this Court in *Pennhurst II* said they should have done — file their federal claims in federal court and their state claims in state court. Ignoring *Beutz*, Petitioners rely upon decisions from Minnesota's intermediate appellate court and argue that Minnesota law required that they at least attempt to have their MHRA claims heard in federal court. (*See* Petitioners' Brief at 10, 16-17.) None of the Minnesota cases Petitioners cite involved state law claims that fell outside the scope of the federal court's jurisdiction because the claims were barred by the Eleventh Amendment. Accordingly, even if these cases could be viewed as accurately setting forth Minnesota law, they would not apply to Petitioner's MHRA claims.

Of course, even if Minnesota applied its claim preclusion doctrine in the manner that Petitioners suggest — which it does not — the solution would have been for Petitioners to file both their federal and state claims in state court. State courts are as competent as federal courts to resolve discrimination claims. *See Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 826 (1990) ("We have no reason to question the presumption that state courts are just as able as federal courts to adjudicate Title VII claims."); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.").

The reality is that the States are fully capable of addressing the problems Petitioners claim that our dual court system creates. *See, e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 363 (1988) (White, J., dissenting) (noting that "[i]t seems unnecessary for this Court to protect plaintiffs

whose federal claims prove 'not tenable' from the operation of state statutes of limitations when the States have shown themselves capable of achieving the same result through saving clauses").[10] In the absence of a federal tolling provision, States may resolve the matter in a number of different ways.[11] To the extent the States may perceive there to be a problem involving claims made under their own laws in their own courts, they have ample opportunity—legislatively

10. It is curious that Petitioners rely so heavily on *Carnegie-Mellon*. (*See* Petitioners' Brief at 20-24.) Unlike Petitioners, the plaintiffs in *Carnegie-Mellon* brought state law claims in state court within the state statute of limitations. 484 U.S. at 352. Had Petitioners followed *Carnegie-Mellon* as their guide, their claims might well have been preserved.

11. State legislatures may enact saving statutes to toll state statutes of limitations when a federal court has dismissed a state law claim for lack of subject matter jurisdiction. *See, e.g.*, Conn. Gen. Stat. Ann. § 52-592(d) (West Supp. 2001); 735 Ill. Comp. Stat. Ann. 5/13-217 (West Supp. 2001); Ky. Rev. Stat. Ann. § 413.270 (Michie 1992). State courts also may apply state equitable tolling law to toll limitations periods when pendent claims are dismissed by a federal court and re-filed in state court. *Compare Addison v. California*, 578 P.2d 941, 945 (Cal. 1978) (relying upon the doctrine of equitable tolling to toll a state law pendent claim's statute of limitations), *with Bond v. Serano*, 566 A.2d 47, 47 (D.C. 1989) (refusing to apply the doctrine of equitable tolling to toll a pendent claim's statute of limitations while the federal court exercised jurisdiction over the claim), *and Burr v. Trinity Med. Ctr.*, 492 N.W.2d 904, 906 (N.D. 1992) (same). On the other hand, States may choose not to toll their statutes of limitations for the period of time a supplemental state claim was pending in federal court, as the Minnesota Supreme Court did in this case. State legislatures also may enact saving statutes that do not apply tolling in this situation. *See, e.g.*, Ala. Code § 6-2-38(p) (1993); Cal. Civ. Proc. Code § 355 (West 1982 & Supp. 2001); Minn. Stat. § 541.18.

and judicially — to address it. Leaving resolution of this issue to the several States not only is reasonable, it is the result our constitutional system requires.

II. Section 1367(d) Should Not be Construed to Abrogate Minnesota's 45-day Limit on the Waiver of Its Sovereign Immunity From Suit in Its Own Courts.

Although § 1367(d) would be plainly unconstitutional under *Alden* and *Pennhurst II* if construed to apply to this case, the statute need not, and indeed should not, be so construed. Rather, this Court should adhere to its longstanding "interpretative rule" that avoids "constitutionally doubtful constructions." *Jones*, 529 U.S. at 851. Section 1367 readily lends itself to such a construction, one that avoids imputing congressional intent to abrogate state sovereign immunity in the absence of unmistakably clear statutory language.

A. Congress Has Not Made Its Intent to Abrogate State Sovereign Immunity Unmistakably Clear in the Language of the Statute.

"'[I]f Congress intends to alter the usual constitutional balance between States and the Federal Government,'" this Court requires that Congress "'make its intention to do so *unmistakably clear* in the language of the statute.'" *Stevens*, 529 U.S. at 787 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (emphasis added)). There is not a shred of evidence, let alone the requisite "unmistakably clear" statutory language, that Congress intended to abrogate state sovereign immunity in any part of § 1367, a statute of broad and general applicability. Section

1367(d) does not even refer to the States' immunity from suit in their own courts. The absence of explicit statutory language supporting abrogation is dispositive.[12] This Court therefore should construe § 1367(d) not to toll the statute of limitations for private state claims originally filed in federal court against a State sovereign. *See id.* at 787 (construing a federal statute as not applicable in private actions against State defendants, both to honor the rule that Congress must speak with unmistakable clarity when it intends to alter the federal-state balance, and to avoid the Eleventh Amendment question); *id.* at 788-89 (Ginsburg, J., concurring) (resting vote on "the clear statement rule applied to private suits against a State"); *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989); *see also Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (construing a federal statute narrowly to avoid an interpretation that would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state

12. Likewise, there is no mention of abrogation in the legislative history. *See* H.R. Rep. No. 101-734, 1, 27-30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6873-76. In fact, Congress rejected a proposal by Professor Arthur D. Wolf, who was contributing to Congress's work on supplemental jurisdiction, that § 1367 specifically provide for supplemental jurisdiction over state law claims against the State. *See Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 686-700 (1990) (Letter Proposal to Codify Supplemental Jurisdiction from Arthur D. Wolf, Prof. of Law, to Rep. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice (June 8, 1990)). That proposal was intended to overrule *Pennhurst II* by abrogating the States' Eleventh Amendment immunity. *Id.* at 699. Congress chose not to adopt this proposal.

power"); *Jones*, 529 U.S. at 858 (construing a federal statute narrowly to avoid the constitutional issues of federalism).

Not only is there no language in § 1367(d) that "unmistakably" indicates Congress's intention to apply tolling against unconsenting States, but the language that does appear confirms Congress's intention not to apply tolling to such claims. Tolling applies only to claims that fall within the supplemental jurisdiction of the federal court as defined in § 1367(a), and that subsection makes clear that only those state law claims that are properly considered part of a "case or controversy under Article III of the United States Constitution" are within supplemental jurisdiction. Under *Pennhurst II*, however, state law claims against unconsenting States do not fall within federal court jurisdiction "under Article III of the United States Constitution," as required by subsection (a). *See Pennhurst II*, 465 U.S. at 98 (emphasizing that "'the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given'" (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)) (emphasis omitted)).

Congress legislates against the backdrop of this Court's decisions. *See United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents . . . ."). Accordingly, this Court may presume Congress knew of *Pennhurst II* and its effect when it enacted § 1367, and would have expected the statute to be interpreted consistently with *Pennhurst II*, such that the tolling provision of subsection (d) would not apply to state law claims falling outside of the supplemental jurisdiction defined in subsection (a).

B. Properly Construed, Section 1367(d) Applies Only to Claims Dismissed Under Section 1367(c).

Not only is § 1367(d) tolling limited to claims that fall within the Article III jurisdiction of the federal court, but, as a leading commentator suggests, "the tolling provision of (d) should be read as coming into play only if the court exercises its discretion, under § 1367(c), to dismiss a supplemental claim of which it has jurisdiction under subsection (a)." 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3567.1 n.51 (2d ed. Supp. 2001).

Section 1367(c) codifies four circumstances, previously outlined in *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), in which a federal court may decline to exercise its jurisdiction over a supplemental state law claim.[13] In these instances, the supplemental claim, which the court otherwise would have been "empowered" to hear, may be dismissed. *See* H.R. Rep. 101-734, at 29, *reprinted in* 1990 U.S.C.C.A.N. at 6875. The statutory scheme thus grants supplemental jurisdiction in subsection (a), provides discretionary reasons for declining such jurisdiction in subsection (c), and finally provides for tolling in subsection (d), suggesting that the tolling authorized by the statute is tied to both the availability of supplemental jurisdiction and the discretionary decision not to exercise it.

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13. Section 1367(c) permits a district court to dismiss supplemental claims when "the claim raises a novel or complex issue of State law;" the state law claim "substantially predominates" over the original jurisdiction claim; the original jurisdiction claim has been dismissed; or there are other "exceptional circumstances" for declining jurisdiction.

This reading is confirmed by the legislative history.[14] The House Report on the Judicial Improvements Act of 1990 addressed the tolling provision of subsection (d) in a short paragraph:

> Subsection 114(d) provides a period of tolling of statutes of limitations for any supplemental claim that is dismissed *under this section* and for any other claims in the same action voluntarily dismissed at the same time or after the supplemental claim is dismissed. The purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court. It also eliminates a possible disincentive from such a gap in tolling when a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim.

H.R. Rep. No. 101-734, at 30, *reprinted in* 1990 U.S.C.C.A.N at 6876 (emphasis added). The only provision in § 1367 for dismissal of supplemental claims "under this section" (*i.e.*, § 114 of the bill, later codified at 28 U.S.C. § 1367) is found in subsection (c), by which the federal courts are given authority to "decline" jurisdiction over certain claims that properly are within the scope of supplemental jurisdiction. By contrast, if the federal court dismisses a

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14. While the language of a statute generally will control if it is unambiguous, this Court may look to legislative history to confirm that its interpretation of a statute is not "at odds with the intentions of the drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

proffered supplemental claim for some reason other than those listed in subsection (c), the tolling provision is inapplicable. *See* 13B Wright, § 3567.1 n.51 ("If something is found not to be a supplemental claim, it will be dismissed under Rule 12(b)(1) and it would not be 'dismissed under this section,'" and the tolling provision would not apply. (citation omitted)).[15]

Consistent with this understanding, the tolling provision does not apply to Petitioners' claims because they were not dismissed for one of the reasons listed in subsection (c). Rather, the federal court dismissed Petitioners' state claims under Federal Rule of Civil Procedure 12 because it did not have jurisdiction over them. (*See* Federal District Court Order, Pet. App. A50 (noting that the University's Motion to Dismiss was brought under Rule 12(b)(1)).)[16]

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15. *See* John Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 945 (1998) ("A close reading of the legislative history conclusively supports" the view Congress intended the tolling provision to apply only to those claims "'[properly] asserted under subsection (a)' that the district court dismissed not for lack of supplemental jurisdiction, but rather because the district court elected not to exercise supplemental jurisdiction for one of the discretionary reasons permitted by subsection (c).").

16. The University pressed the statutory interpretation arguments made here to the courts below. (*See* University's Brief in Minnesota Supreme Court at 11 (arguing that the clear statement rule was not met); University's Brief in Opposition at 3, 8 n.6 (reflecting University's argument to the trial court that statutory tolling is inapplicable when a state law claim is dismissed because the federal court lacked "original jurisdiction" over the action as required by § 1367(a)).) Of course, even if the statutory interpretation grounds had not been argued by the University below, a "respondent may defend the judgment on a ground not previously raised." *United States v. Estate of Romani*, 523 U.S. 517, 526 n.11 (1998).

III. Even Apart from Issues of State Sovereign Immunity and Related Principles of Statutory Construction, Section 1367(d) Exceeds the Scope of Congress's Lawmaking Powers.

While the principles of state sovereign immunity and statutory interpretation discussed above are sufficient to resolve this case against a sovereign defendant, there is a broader, independent constitutional infirmity with § 1367: it exceeds Congress's lawmaking powers. Petitioners devote little attention in their brief to the source of Congress's power to enact § 1367(d), but they seem to suggest that the tolling provision falls within the scope of Congress's tribunal power to establish and regulate the federal courts under Article I, § 8, cl. 9 and Article III, § 1 of the Constitution. (*See* Petitioners' Brief at 41-45.)[17] Neither Congress's tribunal power nor any other Article I power authorizes Congress to enact a sweeping expansion of state statutes of limitations applicable to an unlimited and unspecified variety of state law claims adjudicated in state courts.

Since the Founding Convention, it has been understood that the legislative power of Congress is limited, extending only to those enumerated subjects expressly set forth in the Constitution. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("'The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803))); *see* U.S. Const. amend X. In particular,

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17. *See also* Cert. Pet. at 10 (citing *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 528 S.E.2d 911 (N.C. Ct. App. 2000), *rev. granted*, 352 N.C. 588, 545 S.E.2d 224 (2000); *Blinn v. Florida Dep't of Transp.*, 781 So. 2d 1103 (Fla. Dist. Ct. App. 2000)).

> neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

Congress's tribunal power does not provide plenary authority to rewrite state statutes of limitations applicable to an indeterminate number and variety of state law claims filed in state courts. Rather, the tribunal power granted in Article I and reflected in Article III authorizes Congress to prescribe procedural rules for use in cases pending *in federal court*. *Id.* at 472; *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) ("[28 U.S.C. §] 1404(a) is doubtless capable of classification as a procedural rule . . . ."); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (finding that "a statute mandating when an appeal may be taken from one federal court to another" falls within Congress's tribunal power). The tribunal power cannot be used to support § 1367(d), however, because it is not a procedural rule for the federal courts at all. It is a substantive, outcome-affecting rule for state claims in state court litigation following the conclusion of a federal court proceeding, as illustrated in this case.

Under Minnesota law, the purpose and effect of the statutory 45-day limitations period goes beyond simply providing timely notice to a defendant, as Petitioners contend. (Petitioners' Brief at 39-40.) When the Minnesota Legislature creates a statutory right of action like the MHRA, and "also fixes the time within which the right may be enforced, the time so fixed becomes a

limitation or condition upon the right, and will control, no matter in what forum the action is brought." *Negaubauer v. Great N. Ry. Co.*, 92 Minn. 184, 185, 99 N.W. 620, 621 (1904); *see also In re Daniel's Estate*, 208 Minn. 420, 430, 294 N.W. 465, 470 (1940). This Court repeatedly has recognized that substantive state law defining state claims must be respected. Over 50 years ago, this Court held that "Congress has no power to declare substantive rules of common law applicable in a State." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Moreover, this Court also has declared many times that state statutes of limitations govern state law claims even when those claims are pending in federal court. For example, in *Guaranty Trust Co. v. York*, this Court ruled that the federal court must follow the state statute of limitations because the right at issue was "derived not from the United States but from one of the States." 326 U.S. 99, 108-09 (1945); *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (following a state rule that was an "integral part of the several policies served by the statute of limitations"); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949) ("We cannot give [the claim] longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie* . . . .").

Congress's tribunal power never has been used to support the kind of displacement of state substantive law governing state claims in state court that § 1367(d) effectuates. Indeed, Petitioners cite no decision of this Court affirming such sweeping congressional authority.[18] There is no such authority

18. Petitioners argue that Congress has the authority to alter the substance of state law claims under an asserted power to (Cont'd)

because, as this Court has noted, when Congress purports to dictate to state courts the law governing adjudication of state claims, Congress must utilize a power other than its tribunal powers. *See Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984) (observing that "Congress would need to call on the Commerce Clause if it intended the [Federal Arbitration] Act to apply in state courts"); *see also id.* at 28 (O'Connor, J., dissenting) ("[A] power derived from Congress's Art. III control over federal court jurisdiction would not by any flight of fancy permit Congress to control proceedings in state courts."). In *Southland*, this Court held that since the Federal Arbitration Act, 9 U.S.C. § 2, was validly enacted pursuant to the Commerce Clause, it controlled in state court proceedings even though it conflicted with state law. *See* 465 U.S. at 11 ("The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause."); *see also id.* at 12-13 ("'The purpose of this bill is to make valid and enforcible [sic] agreements for arbitration contained *in contracts involving interstate commerce* . . . .'" (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (alterations in original))).

In stark contrast to the Federal Arbitration Act, there is nothing whatever in the legislative history of § 1367(d) to suggest that Congress even considered exercising its commerce powers

(Cont'd)

"coordinat[e] the relationship between the federal and state court systems." (Petitioners' Brief at 43.) Precedent from this Court confirms that any such "coordination" authority cannot be used in this manner. *See Erie R.R.*, 304 U.S. at 79 ("'Supervision over either the legislative or judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States.'" (quoting *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting))).

to enlarge state statutes of limitations over a potentially dizzying variety of state law claims heard in state courts. *See* H.R. Rep. No. 101-734, at 27-30, *reprinted in* 1990 U.S.C.C.A.N. at 6873-76. Petitioners do not contend that Congress did so when it enacted § 1367(d).[19] Moreover, had Congress relied upon its commerce powers to enact the tolling provision, this Court's recent Commerce Clause decisions confirm that such power would be insufficient.

In *United States v. Lopez*, this Court noted that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government.'" 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Congress's commerce power "'may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a

19. Petitioners do note that Congress has exercised its Article I powers to toll statutes of limitations in other contexts. (*See* Petitioners' Brief at 26 n.36, 28.) But these examples — insofar as they are relevant at all to the issue here — only show that Congress's power to amend state laws applicable to state claims heard in state courts must be found in a constitutional provision other than its tribunal powers. For example, Congress clearly has authority under its Article I war powers to suspend statutes of limitations during times of armed conflict, or to benefit those who are in military service. *See, e.g., Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870) (holding that a federal law suspending the running of statutes of limitations during the Civil War was constitutional under Congress's war powers). Congress invoked its commerce powers to enact Y2K legislation. *See* 15 U.S.C. § 6601(b) (Supp. 1999). These statutes confirm that when Congress preempts state law, it must do so through use of a power separate from its tribunal power.

completely centralized government.'" *Id.* (quoting *Jones & Laughlin*, 301 U.S. at 37). In *Lopez*, federal legislation establishing gun-free zones around schools was invalidated because the Court declined to "pile inference upon inference" in order to find some effect on interstate commerce. *Id.* at 567; *see also Morrison*, 529 U.S. at 608 (explaining the limits on Congress's commerce powers).

The same piling-on of speculative inferences would be required to sustain § 1367(d) under the Commerce Clause. As with the statute invalidated in *Lopez*, § 1367(d) certainly is not

> a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [it] be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if [the statute] is to be sustained, it must be . . . a regulation of an activity that substantially affects interstate commerce.

514 U.S. at 559. But § 1367(d) is a federal court jurisdiction statute that, like the statute invalidated in *Lopez*, by its terms has nothing to do with "commerce" or any particular forms of commercial activity. *See id.* at 561. Similarly, § 1367(d) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the activity "in question affects interstate commerce." *Id.* Nor are there any legislative findings regarding the effect, if any, of § 1367(d) upon interstate commerce. *See id.* at 562 (stating that the Court will consider legislative findings "regarding effect on interstate commerce"). In sum, "[a]bsent a stronger connection or identification with

commercial concerns that are central to the Commerce Clause," § 1367(d) "contradicts the federal balance the Framers designed and that this Court is obliged to enforce." *Id.* at 583 (Kennedy, J., concurring). *Compare Morrison*, 529 U.S. at 613 (noting that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"), *with Reno v. Condon*, 528 U.S. 141, 148 (2000) ("Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation."). In light of this analysis, § 1367(d) simply cannot be justified either under the tribunal power or under the Commerce Clause.[20]

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20. It is no answer to the lack of enumerated power under Article I for Petitioners simply to rely on the Supremacy Clause. U.S. Const. art. VI. The Supremacy Clause does not authorize otherwise unconstitutional legislation. Rather, it elevates to the "Law of the Land" only those laws that are within Congress's authority to enact. *See Alden*, 527 U.S. at 731 ("Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power."). In like fashion, the Necessary and Proper Clause is not an independent source of congressional authority. The Necessary and Proper Clause authorizes Congress to pass those laws that are "necessary and proper for carrying into Execution the *foregoing Powers*." U.S. Const. art. I, § 8, cl. 18 (emphasis added). Because none of the "foregoing powers" in Article I authorizes Congress to modify generally state statutes of limitations for state claims brought in state court, there can be no resort to the Necessary and Proper Clause to support enactment of § 1367(d). *See Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (noting that Necessary and Proper Clause "is not itself a grant of power").

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTE

Supplemental Jurisdiction — 28 U.S.C. § 1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.